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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

BREWSTER KAHLE, INTERNET ARCHIVE, RICHARD PRELINGER, AND PRELINGER ASSOCIATES, INC. Plaintiffs, v. JOHN ASHCROFT, in his official capacity as Attorney General of the United States, Defendant.	**Case No. 04-CV-1127 MMC** **DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT** **Date: Friday, August 6, 2004** **Time: 9:00 a.m.** **Courtroom: 7, 19th Floor** **Judge: The Honorable Maxine M. Chesney**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

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PLEASE TAKE NOTICE that on August 6, 2004 at 9:00 a.m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable Maxine M. Chesney, United States District Judge, in the United States Courthouse located at 450 Golden Gate Avenue, San Francisco, California, Defendant will, and hereby does, move the Court to dismiss all claims against him for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities in support, on the pleadings and records on file in this action, and on such other argument and evidence as may be presented to this Court at or before the hearing on this Motion.

Dated: June 23, 2004.

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Relief Sought 1

Introduction 1

Statutory and Regulatory Background 2

I. Copyright Term Extensions 2

II. Amendments to the Copyright Renewal Requirement 3

III. Copyright Deposit and Notice Requirements 6

Argument 7

I. Congress Had the Constitutional Authority to Enact the Challenged Copyright Acts 7

A. The 1976 Act, the 1992 Act, and the BCIA Promote the Progress of Science 7

1. The 1976 Act promotes the progress of science 9

2. The 1992 Act promotes the progress of science 13

3. The BCIA promotes the progress of science 16

B. The CTEA and the 1992 Act Do Not Violate the "limited Times" Clause 19

II. The CTEA and the 1992 Act Do Not Violate the First Amendment 21

Conclusion 25

TABLE OF AUTHORITIES

CASES

321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004)........ 18

Eldred v. Ashcroft, 537 U.S. 186, 123 S. Ct. 769 (2003)........ passim

Eldred v. Reno, 74 F. Supp. 2d 1 (D.D.C. 1999), *aff'd*, 239 F.3d 372 (D.C. Cir. 2001), *aff'd sub nom. Eldred v. Ashcroft*, 537 U.S. 186, 123 S. Ct. 769 (2003)........ 2

Garnier v. Andin Int'l, Inc., 36 F.3d 1214 (1st Cir. 1994)........ 6, 7, 16

Graham v. John Deere Co., 383 U.S. 1, 86 S. Ct. 684 (1966)........ 9

Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 105 S. Ct. 2218, (1985)........ 21, 22

John G. Danielson, Inc. v. Winchester-Conant Properties, inc., 322 F.3d 26 (1st Cir. 2003)........ 16

Ladd v. Law & Technology Press, 762 F.2d 809 (9th Cir. 1985)........ 6, 8, 12, 13

Luck's Music Library, Inc. v. Ashcroft, -- F. Supp. 2d --, No. 01-2220 (RMU), slip op. (D.D.C. June 10, 2004, amended June 16, 2004)........ 9, 17, 23

Mazer v. Stein, 347 U.S. 201, 74 S. Ct. 460 (1954)........ 8

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)........ 8

Missouri v. Holland, 252 U.S. 416, 40 S. Ct. 382 (1920)........ 18

Pennock v. Dialogue, 27 U.S. 1 (1829)........ 20

Sony Corp. of Am. v. Universal Studios, 464 U.S. 417, 104 S. Ct. 774 (1984)........ 9

Stewart v. Abend, 495 U.S. 207, 110 S. Ct. 1750 (1990)........ 9

United States v. Elcom Ltd., 203 F. Supp. 2d 1111 (N.D. Cal. 2002)........ 18

Washingtonian Publ'g Co. v. Pearson, 306 U.S. 30, 59 S. Ct. 397 (1939)........ 6, 12

STATUTES

17 U.S.C. § 107........ 22

17 U.S.C. § 108........ 23

17 U.S.C. § 110 23

17 U.S.C. § 302 2

17 U.S.C. § 304 14

17 U.S.C. § 401 .... 7, 16, 17

17 U.S.C. § 402 .... 7, 16, 17

17 U.S.C. § 407 .... 6, 12

Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439 (“1831 Act”) 3, 23

Act of Mar. 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1075, 1080-81 (“1909 Act”) .... passim

Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (“1790 Act”) 3

Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (“BCIA”) .... passim

Copyright Act of 1976, 17 U.S.C. § 301 *et seq.* (“1976 Act”) .... passim

Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 266 (1992) (“1992 Act”) .... passim

No Electronic Theft Act of 1997, 17 U.S.C. § 506(a) (1997) (“NET Act”) 1

Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (“CTEA”) .... passim

OTHER AUTHORITIES

H.R. Rep. No. 100-609 (1988) 16

H.R. Rep. No. 94-1476 (1976) .... passim

S. Rep. No. 100-352 (1988) 16, 17

S. Rep. No. 102-194 (1992) .... passim

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I .... passim

U.S. Const. art. I, § 8, cl. 18 8

U.S. Const. art. I, § 8, cl. 8 .... passim

U.S. Const. art. II, cl. 2 18

STATEMENT OF RELIEF SOUGHT

Defendant seeks an order dismissing Plaintiffs' "Amended Complaint for Declaratory Judgment" ("Amended Complaint" or "Am. Compl.") pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

INTRODUCTION

Plaintiffs Brewster Kahle, Internet Archive, Richard Prelinger, and Prelinger Associates, Inc. allege that they are individuals or organizations that exploit the creative works of others that are in the public domain by copying and distributing such works on the Internet. Am. Compl. ¶¶ 2-5, 8. In this action, Plaintiffs seek declaratory judgment that four copyright statutes are unconstitutional because they allegedly create an "unconditional copyright regime" that prevents Plaintiffs from posting "on the Internet [] works created [by others] between 1964 and 1978" without committing infringement. *Id.* ¶¶ 1, 8, 35, Prayer for Relief. Specifically, Plaintiffs allege that (1) the Copyright Act of 1976, 17 U.S.C. § 301 *et seq.* ("1976 Act"), the Berne Convention Implementation Act, Pub. L. No. 100-568, 102 Stat. 2853 (1988) ("BCIA"), and the Copyright Renewal Act of 1992, Pub. L. No. 102-307, 106 Stat. 266 (1992) ("1992 Act") violate the Intellectual Property Clause "for failing to 'promote . . . Progress'" (Am. Compl. ¶¶ 1, 105-113); (2) the 1992 Act and the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) ("CTEA") violate the "limited Times" provision of the Constitution's Intellectual Property Clause (Am. Compl. ¶¶ 1, 93-104, 114-119); and (3) the 1992 Act and the CTEA violate the First Amendment of the Constitution. Am. Compl. ¶¶ 1, 81-92.[1]

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[1] Plaintiffs also seek, upon the Court's finding that the CTEA is unconstitutional, to enjoin enforcement of the No Electronic Theft Act of 1997, 17 U.S.C. § 506(a) (1997) ("NET Act"), against them for infringement of copyrights for works in their renewal term first published between January 1, 1964 and December 31, 1977 that would not have a valid copyright "but

Plaintiffs' challenges to Congress' most recent extension of copyright terms and changes to the requirements for copyright renewal are manifestly challenges to policy determinations that the Constitution authorizes Congress to make. Indeed, the Supreme Court has repeatedly stressed "that it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Eldred v. Ashcroft*, 537 U.S. 186, 212, 123 S. Ct. 769, 785 (2003). Congress' exercise of its Intellectual Property Clause authority in enacting the challenged copyright statutes is subject to a rational basis review, and here, as set forth more fully below, Congress had a rational basis for enacting each such statute. Further, as the Supreme Court in *Eldred v. Ashcroft* confirmed, a copyright extension for a fixed term, such as the CTEA, does not evade the Intellectual Property's "limited Times" constraint. 537 U.S. at 204, 123 S. Ct. at 781. In addition, neither the 1992 Act nor the CTEA alter "the traditional contours of copyright protection" – namely, the "idea/expression dichotomy" and the "fair use" defense comprising copyright law's built-in First Amendment accommodations – and thus require no further First Amendment scrutiny. *See id.*, 537 U.S. at 218-21, 123 S. Ct. at 788-90.

Accordingly, Defendant respectfully requests the Court to dismiss Plaintiffs' Amended Complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

STATUTORY AND REGULATORY BACKGROUND

I. COPYRIGHT TERM EXTENSIONS

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for 17 U.S.C. §§ 302-304, as amended by the CTEA." Am. Compl. ¶ 1, Prayer for Relief. Defendant respectfully submits that, as Plaintiffs' claim that the CTEA is unconstitutional should be dismissed, Plaintiffs' injunctive relief request should also be dismissed. *E.g. Eldred v. Reno*, 74 F. Supp. 2d 1, 2, n.2 (D.D.C. 1999) (same), *aff'd*, 239 F.3d 372 (D.C. Cir. 2001), *aff'd sub nom. Eldred v. Ashcroft*, 537 U.S. 186, 123 S. Ct. 769 (2003).

In 1790, the year after the adoption of the Constitution, the First Congress enacted the nation's first Copyright Act, establishing a 14-year initial term of copyright protection from the date of publication, renewable for an additional 14 years if the author survived the first term – for a potential total term of 28 years. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 ("1790 Act"). In 1831, Congress unconditionally extended the initial term to 28 years (while retaining the 14-year renewal term), extending the potential total term to 42 years. Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439 ("1831 Act"). In 1909, Congress then extended the copyright's renewal term to 28 years, further extending the total copyright term to 56 years. Act of Mar. 4, 1909, ch. 320, §§ 23-24, 35 Stat. 1075, 1080-81 ("1909 Act").

In 1976, Congress altered the method for computing copyright terms for works created on or after January 1, 1978 and established a single term of copyright protection for the life of the author plus 50 years. 17 U.S.C. §§ 302-304 (1976 Act). "In these respects, the 1976 Act aligned United States copyright terms with the then-dominant international standard adopted under the Berne Convention for the Protection of Literary and Artistic Works." *Eldred*, 537 U.S. at 195, 123 S. Ct. at 775-76 (citing H.R. Rep. No. 94-1476, at 135 (1976)). In 1998, Congress enacted the CTEA, which extended this copyright term by 20 years to the life of the author plus 70 years for all works not created by January 1, 1978 (17 U.S.C. §§ 302(a), 303(a)) to "harmonize[] the baseline United States copyright term with the term adopted by the European Union in 1993." *Id.*, 537 U.S. at 196; 123 S. Ct. at 776. By matching the United States' copyright term with the European Union's, "Congress sought to ensure that American authors would receive the same copyright protection in Europe as their European counterparts." *Id.*, 537 U.S. at 205-06, 123 S. Ct. at 781.

II. AMENDMENTS TO THE COPYRIGHT RENEWAL REQUIREMENT

Under the 1909 Act, a copyright holder could secure a 28-year renewal term only after filing a renewal registration with the Register of Copyrights in the last year of the first 28-year term of protection. S. Rep. No. 102-194, at 3 (1992). "In 1976, Congress concluded years of debate and study on all aspects of the Copyright Act by passing a comprehensive revision to the 1909 law." *Id.* Congress identified the copyright renewal revision as "[o]ne of the worst features of the present copyright law." H.R. Rep. No. 94-1476, at 134. "A substantial burden and expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of copyright." *Id.* Thus, the 1976 Act abolished the renewal requirement for future works created on or after January 1, 1978 – the effective date of the Copyright Act of 1976 – and established a single term of copyright protection for the life of the author plus 50 years. S. Rep. No. 102-194, at 3. However, Congress retained the existing renewal registration requirement for copyrights still subsisting in their first term on the 1976 Act's effective date because "Congress was concerned that eliminating the renewal requirement for these works altogether could potentially disrupt existing expectancies or contractual interests." S. Rep. No. 102-194, at 3-4; H.R. Rep. No. 94-1476, at 139.[2]

The Copyright Office, publishers, authors, academics, and others "criticized the registration renewal provision for being burdensome and unfair to thousands of copyright holders and their heirs." S. Rep. No. 102-194, at 4. Congress believed that the public domain "should not be enlarged because of an author's error in recordkeeping, or any other innocent failure to comply with overly technical formalities in the copyright law." *Id.* at 6.

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[2] Although Congress retained the renewal registration requirement for copyrights still in their first term prior to the 1976 Act's effective date, the length of the renewal term for such copyrights was extended from 28 to 47 years (for a total potential term of 75 years), and

Significantly, Congress recognized that authors of earlier works who were still subject to the 1976 Act's renewal requirements should retain the same rights enjoyed by authors of more recent works created after the 1976 Act's effective date. *Id.* Congress also sought to modify the 1976 Act's renewal requirement because foreign authors faced an additional dilemma as they were even less familiar than domestic authors with the formality of a renewal requirement because it is unique to U.S. law. In fact, Congress understood that "[t]he domestic laws of most developed countries contain very few formalities conditioning copyright protection" and that compliance with such formalities are "antithetical to the major international treaty on copyright relations, the Berne Convention." *Id.*

Based on these important concerns, Congress enacted the 1992 Act, which amended the renewal provisions set forth in 17 U.S.C. § 304 to "make[] clear that a timely registration by the proper statutory claimant vests the right to the renewal term on the date of registration in the Copyright Office and, if a registration is not made, the right in the renewal term vests automatically in the proper statutory claimant on the last day of the first term." S. Rep. No. 102-194, at 4. The automatic renewal provisions apply only to those pre-January 1, 1978 works still in their first 28-year copyright term when the 1992 Act was enacted, *i.e.* works that acquired a first term of copyright protection between January 1, 1964 and December 31, 1977. *See id.* at 7. Thus, the 1992 Act puts protection of such works on equal footing with the protection of qualifying works for which renewal registration was made without restoring protection to works that had already fallen into the public domain. *Id.* At the same time, Congress recognized that a renewal registration system "provides a useful public record for users of copyrighted material so they may locate the copyright holder and arrange to license a

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copyrights already in their renewal term at that time would be extended by an amount sufficient to extend their total term to 75 years. H.R. Rep. No. 94-1476, at 139-40.

work, or determine when copyright material falls into the public domain." *Id.* at 6-7. Accordingly, the 1992 Act offers incentives to authors to continue to voluntarily renew their copyright in a timely manner, while it "eliminates the harsh consequences of failing to renew." *Id.* at 7.

III. COPYRIGHT DEPOSIT AND NOTICE REQUIREMENTS

As the Supreme Court stated in *Washingtonian Publ'g Co. v. Pearson*, the purpose of this deposit requirement, currently set forth in 17 U.S.C. § 407, is not proof or preservation of copyright but the acquisition of books for the Library. 306 U.S. 30, 41, 59 S. Ct. 397, 402 (1939). "Until 1976, failure to deposit with the Library of Congress resulted in a forfeiture of copyright." *Ladd v. Law & Technology Press*, 762 F.2d 809, 813 (9th Cir. 1985). With the enactment of the Copyright Act of 1976, Congress changed the deposit enforcement provisions because

> A realistic fine, coupled with the increased inducements for voluntary registration and deposit under other sections of the bill, seems likely to produce a more effective deposit system than the present one. The bill's approach will also avoid the danger that, under a divisible copyright, one copyright owner's rights could be destroyed by another owner's failure to deposit.

Id. (quoting H.R. Rep. No. 94-1476, at 150). Under the 1976 Act, therefore, deposit is still required of one obtaining a copyright, but failure to deposit results not in forfeiture but in fines in the amount of the cost to the library of obtaining the work plus penalties. *Id.*

With respect to copyright notice, under the 1909 Act, a work had to bear a valid copyright notice upon publication in order to secure copyright protection. 17 U.S.C. §§ 10, 19 *et seq.* (1909 Act). In 1988, Congress enacted the BCIA to bring the United States in line with the Berne Convention, an international convention aimed at harmonizing copyright law around the world. *Garnier v. Andin Int'l, Inc.*, 36 F.3d 1214, 1219 (1st Cir. 1994). Pursuant to the BCIA, the attachment of notice of copyright is no longer required to gain copyright protection for works first published after March 1, 1989, but it is still encouraged through various incentives. *Id.*; 17 U.S.C. §§ 401(d), 402(d).

ARGUMENT

I. CONGRESS HAD THE CONSTITUTIONAL AUTHORITY TO ENACT THE CHALLENGED COPYRIGHT ACTS

Plaintiffs allege that Congress exceeded its authority under the Intellectual Property Clause when it enacted the 1976 Act, the BCIA, and the 1992 Act because such statutes allegedly changed the renewal, registration, deposit and notice requirements in a way that "failed to promote progress." Am. Compl. ¶¶ 105-113, 111. Plaintiffs further contend that Congress did not have the authority to enact the 1992 Act and the CTEA because (1) they allegedly create a copyright term that "has become effectively perpetual" and (2) "Congress has no power to extend the terms of existing copyrights" in violation of the "limited Times" provision of the Intellectual Property Clause. Am. Compl. ¶¶ 93-104, 114-19, 103, 117. Contrary to Plaintiffs' claims, however, each challenged statute reflects a rational exercise of Congress' legislative authority and sets forth copyright terms for "limited Times" pursuant to the Intellectual Property Clause.

A. The 1976 Act, the 1992 Act, and the BCIA Promote the Progress of Science

Congress had a rational basis for believing that the 1976 Act, the BCIA, and the 1992 Act "promote the Progress of Science." All versions of the Copyright Act have been enacted pursuant to the power granted Congress by Article I, Section 8, Clause 8 of the Constitution (the "Intellectual Property Clause" or "Copyright Clause"), which states that "The Congress shall have the Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and

Discoveries." *Accord Ladd*, 762 F.2d at 812.[3] Thus, the Intellectual Property Clause provides Congress with the power to grant a limited monopoly through copyrights to authors for their particular writings. *Mazer v. Stein*, 347 U.S. 201, 207-09, 74 S. Ct. 460, 465-66 (1954). This "constitutional command" asks Congress, to the extent that it enacts copyright laws at all, to create a system that promotes the progress of science. *Eldred*, 537 U.S. at 212, 123 S. Ct. at 785.

Plaintiffs allege that Congress exceeded its authority under the Intellectual Property Clause when it enacted the 1976 Act, the BCIA, and the 1992 Act because such statutes allegedly changed the renewal, deposit and notice requirements in a way that "failed to promote progress." Am. Compl. ¶¶ 105-113, 111. In *Eldred*, however, the Supreme Court held that such challenges are adjudicated only to ensure that a rational basis exists for believing that the statute promotes progress. 537 U.S. at 213, 123 S. Ct. at 785 (affirming judgment that the CTEA "promote[s] the Progress of Science" because Congress had rational basis for its enactment). Significantly, the Supreme Court has also stressed that the Constitution grants Congress, not the courts, the power to select the best policy for pursuing the Intellectual Property Clause's objectives – including the objective of promoting the progress of science. *Eldred*, 537 U.S. at 212, 123 S. Ct. at 785. Thus, Congress' enactment of the 1976 Act, the BCIA, and the 1992 Act must be upheld as constitutionally promoting the progress of science so long as they are "a rational exercise of the legislative authority conferred by the Copyright Clause. On that point, we defer substantially to Congress."

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[3] In carrying out the Intellectual Property Clause, Congress can make "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. Const. art. I, sec. 8, cl. 18; *see also Ladd*, 762 F.2d at 812 (holding that "the necessary and proper clause should be liberally construed"); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404-21 (1819) (mandating an expansive construction of the "necessary and proper" clause as essential to the functioning of a national government).

Eldred, 537 U.S. at 204, 123 S. Ct. at 781; *Luck's Music Library, Inc. v. Ashcroft*, -- F. Supp. 2d --, No. 01-2220 (RMU), slip op. at 17 (D.D.C. June 10, 2004, amended June 16, 2004), Exhibit 1 hereto, (holding that Section 514 of the Uruguay Round Agreements Act ("URAA") is constitutional because it "has a rational relationship to the promotion of science").[4]

1. The 1976 Act promotes the progress of science.

Congress had a rational basis for believing that the 1976 Act's changes to the deposit and renewal requirements promote the progress of science. The 1976 Act's elimination of the renewal requirement for works created on or after January 1, 1978 – establishing a single term of copyright protection for the life of the author plus 50 years – is a rational method of promoting the progress of science. *See* 17 U.S.C. § 302 (1976 Act). Congress established this single term of copyright protection based on several rational policy reasons. For example, Congress identified the copyright renewal revision as "[o]ne of the worst features of the present copyright law" because it was "a substantial burden and expense[;] this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of copyright." H.R. Rep. No. 94-1476, at 134. Thus, Congress rationally believed that the 1976 Act's replacement of the

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4 *See also Stewart v. Abend*, 495 U.S. 207, 230, 110 S. Ct. 1750, 1765 (1990) ("Th[e] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces . . . it is not our role to alter the delicate balance Congress has labored to achieve"); *Sony Corp. of Am. v. Universal Studios*, 464 U.S. 417, 429, 104 S. Ct. 774, 782 (1984) ("it is Congress that has been assigned the task of defining the scope of [rights] that should be granted to authors or to inventors in order to give the public appropriate access to their work product"); *Graham v. John Deere Co.*, 383 U.S. 1, 6, 86 S. Ct. 684, 688 (1966) ("Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim.").

renewal system with a life-plus-50 year single term would better promote progress by minimizing the burdens and expenses of renewals.[5]

In addition, as *Eldred* recognized, "the 1976 Act aligned United States copyright terms with the then-dominant international standard adopted under the Berne Convention for the Protection of Literary and Artistic Works." 537 U.S. at 195, 123 S. Ct. at 775-76 (citing H.R. Rep. No. 94-1476, at 135). Congress recognized that "[n]o country in the world has provisions on the duration of copyright like ours," and that the United Stated needed "to conform the duration of U.S. copyright to that prevalent throughout the rest of the world" where "[a] very large majority of the world's countries have adopted a copyright term of the life of the author and 50 years after the author's death." H.R. Rep. No. 94-1476, at 135. Indeed, this term was "required for adherence to the Berne Convention." *Id.* at 135-36.

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[5] Congress also replaced the renewal system with a copyright term based on the life of the author because

(1) the 56-year term was "not long enough to insure an author and his dependents the fair economic benefits from his works. Life expectancy has increased substantially, and more and more authors are seeing their works fall into the public domain during their lifetimes, forcing later works to compete with their own early works in which copyright ha[d] expired;"

(2) "tremendous growth in communications media ha[d] substantially lengthened the commercial life of a great many works;"

(3) "too short a term harms the author without giving any substantial benefit to the public [who] frequently pays the same for works in the public domain as it does for copyrighted users at the author's expense;"

(4) computing based on the life of the author provides a simpler and clearer method for computing the term based on a "definite determinable event" than "the confusion and uncertainty involved in the vague concept of 'publication.'"

H.R. Rep. No. 94-1476, at 134-35. *Cf. Eldred*, 537 U.S. at 207 n.14, 123 S. Ct. at 782 n.14 (acknowledging as rational bases for the CTEA's 20-year term extension (1) "increases in human longevity" and (2) "failure of the U.S. copyright term to keep pace with substantially increased commercial life of copyrighted works")) (citations omitted).

The Supreme Court's *Eldred* decision recognized that giving U.S. authors the same copyright protection as those received by foreign authors is a rational means of "promot[ing] the Progress of Science." In *Eldred*, the Supreme Court noted that the principal reason for enacting the CTEA was to respond to "a 1993 European Union (EU) directive instructing EU members to establish a copyright term of life plus 70 years." 537 U.S. at 205, 123 S. Ct. at 781. The United States' failure to match Europe's term would have resulted in lesser protection in Europe for U.S. authors, and thus the CTEA secured equal protection for U.S. authors by adhering to Europe's copyright term. *Id.* (citing Berne Conv. Art. 7(8)). The Supreme Court concluded that the CTEA was a rational method of promoting progress under the Copyright Clause to "ensure that American authors would receive the same copyright protection in Europe as their European counterparts." *Id.*, 537 U.S. at 205-06, 205, 208, 123 S. Ct. at 781, 781, 782 ("The CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain. . . . The CTEA is a rational enactment").

Like the CTEA, the 1976 Act's replacement of a renewal system for computing a copyright term to one based on the life of the author promotes the "Progress of Science." Congress enacted both statutes to match the international community's standards and thereby better protect U.S. authors. Accordingly, a rational basis supports Congress' determination that the 1976 Act's elimination of the renewal term for works created on or after January 1, 1978 "promote[s] the Progress of Science."[6]

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[6] Plaintiffs contend that Congress chose the wrong policy in the 1976 Act because it "eliminated the mechanism by which unnecessary copyrights can be removed . . . and thereby limited the ability of would-be users [*i.e.*, Plaintiffs] to exploit the vast majority of copyrighted material that would otherwise . . . be dedicated to the public domain" because before 1976, an average 85-92% of copyrighted works were not renewed, and most of these

Furthermore, the Ninth Circuit also upheld the constitutionality of the 1976 Act's deposit requirement, 17 U.S.C. § 407, as promoting the progress of science. *Ladd*, 762 F.2d at 814, 815. Plaintiffs contend that, when the 1976 Act stopped enforcing a failure to deposit with copyright forfeiture, Congress eliminated the deposit of copyrighted works as a "condition" of securing copyright protection and thereby unconstitutionally failed to promote the progress of science. *E.g.* Am. Compl. ¶¶ 47, 86, 109(2). In fact, the purpose of the deposit requirement is the acquisition of books for the Library of Congress, not to secure copyright protection. *Pearson*, 306 U.S. at 41, 59 S. Ct. at 402; *id.*, 306 U.S. at 37; 59 S. Ct. at 401 (since the 1909 Act, "it is no longer necessary to deposit anything to secure a copyright of a published work.") (internal quotations omitted); *Ladd*, 762 F.2d at 813; *id.* at 812 ("the deposit requirement's purpose is to enforce contributions of desirable books to the Library of Congress"). Under the 1909 Act, if the copyright owner chose not to deposit two copies with the Library of Congress following demand by the Register of Copyrights, then the copyright was forfeit. *Ladd*, 762 F. 2d at 814. In 1976, Congress changed the deposit enforcement provisions because

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were of no commercial value. *E.g.* Am. Compl. ¶¶ 42, 109. Congress not only considered these precise policy concerns; Congress rejected them:

> A point that has concerned some educational groups arose from the possibility that, since a large majority (now about 85%) of all copyrighted works are not renewed, a life-plus-50 year term would tie up a substantial body material that is probably of no commercial interest . . . Balanced against this are the burdens and expenses of renewals, the near impossibility of distinguishing between types of work in fixing a statutory term, and the extremely strong case in favor of a life-plus-50 system. . . . The advantages of a basic term of copyright enduring for the life of the author and for 50 years after the author's death outweigh any possible disadvantages.

H.R. Rep. No. 94-1476, at 136. Most significantly, Plaintiffs' policy objections to the 1976 Act are unavailing because "courts are not at liberty to second-guess determinations and policy judgments of this order, however, debatable or arguably unwise they may be." *Eldred*, 537 F.2d at 208, 123 S. Ct. at 782-83.

> [a] realistic fine, coupled with the increased inducements for voluntary registration and deposit under other sections of the bill, seems likely to produce *a more effective deposit system than the present one*. The bill's approach will also avoid the danger that, under a divisible copyright, one copyright owner's rights could be destroyed by another owner's failure to deposit.

Ladd, 762 F.2d at 813 (quoting H.R. Rep. No. 94-1476, at 150) (emphasis added). In other words, Congress rationally exercised its Intellectual Property Clause authority in amending the deposit requirement "to produce a more effective deposit system than the present one." In so doing, the Ninth Circuit held that the 1976 Act's deposit requirement was a rational method of furthering the Intellectual Property Clause's "purpose of promoting the public interest in the arts and sciences." *Id.* at 814, 815 ("the deposit requirement here directly furthers the purpose of promoting arts and sciences by adding to the collection of our national library").

2. The 1992 Act promotes the progress of science.

Congress had a rational basis for believing that the 1992 Act's changes to the renewal registration requirements would promote the progress of science. In considering whether to pass the 1992 Act, Congress recognized that the 1976 Act's retention of the renewal registration requirement for pre-January 1, 1978 works did not grant authors of such works the same level of protection granted to authors of works created on or after January 1, 1978 – for whom the requirement had been eliminated by the 1976 Act. S. Rep. No. 102-194, at 6. For those still subject to the renewal requirement, the Copyright Office, publishers, authors, academics, and others "criticized the registration renewal provision for being burdensome and unfair to thousands of copyright holders and their heirs." *Id.* at 4. The effects of the renewal requirement were "felt most harshly by the holders of copyrights in less noted works . . . [who] typically lack the sophisticated resources – detailed recordkeeping procedures to keep track of renewal dates or the services of lawyers, agents, and large publishing houses – to assist them in complying with the intricacies of the renewal provision" and who often depend on such works as "the sole source of income for authors and their families." *Id.* at 4-5. Congress believed that the public domain "should not be enlarged because of an author's error in recordkeeping, or any other innocent failure to comply with overly technical formalities in the copyright law." *Id.* at 6. In contrast, authors of works created on or after January 1, 1978 (and authors who had already renewed their pre-1978 works) were protected from a similar inadvertent loss of copyright because the renewal registration requirement did not apply to them.

To resolve this disparity in protection, Congress amended the renewal registration provisions set forth in 17 U.S.C. § 304 to "make[] clear that a timely registration by the proper statutory claimant vests the right to the renewal term on the date of registration in the Copyright Office and, if a registration is not made, the right in the renewal term vests automatically in the proper statutory claimant on the last day of the first term." S. Rep. No. 102-194, at 4. The automatic renewal provisions apply only to those pre-January 1, 1978 works still in their first 28-year copyright term when the 1992 Act was enacted, *i.e.* works that acquired a first term of copyright protection between January 1, 1964 and December 31, 1977.[7] *Id.* at 7. Thus, by granting automatic renewal to these works, Congress gave all

[7] At the same time, Congress recognized that a renewal registration system "provides a useful public record for users of copyrighted material so they may locate the copyright holder and arrange to license a work, or determine when copyright material falls into the public domain." S. Rep. No. 102-194, at 6-7. As a result, the 1992 Act offers incentives to authors to continue to voluntarily renew their copyright in a timely manner. For example, registration renewal entitles the author to *prima facie* evidence of the validity of the copyright, and greater control, in the renewal term, of the use of derivative works which the copyright holder authorized to be made in the first term. *Id.* at 7.

authors – present and future – the same protection from the "harsh consequences" of a renewal requirement.[8] *See id.*

As the *Eldred* Court recognized in the context of term extensions, the Intellectual Property Clause empowers Congress "to secure the same level and duration of protection for all copyright holders, present and future." 537 U.S. at 199, 123 S. Ct. at 778. Indeed, "Congress could rationally seek to 'promote . . . Progress' by including in every copyright statute an express guarantee that authors would receive the benefit of any later legislative extension of the copyright term." *Id.*, 537 U.S. at 215, 123 S. Ct. at 786. Likewise, the 1992 Act ensures that past and future authors are equally protected from losing their works "irretrievably into the public domain" based on an innocent failure to comply with renewal registration formalities. S. Rep. No. 102-194, at 5, 7. Accordingly, Congress' enactment of the 1992 Act is a rational exercise of Congress' authority under the Intellectual Property Clause that "promote[s] the Progress of Science." *See Eldred*, 537 U.S. at 208, 213, 123 S. Ct. at 782-83, 785 (holding that "the CTEA is a rational enactment" and rejecting the conclusion that "treating future and existing copyrights in parity for term extension purposes [] is an impermissible exercise of Congress' power under the Copyright Clause").[9]

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[8] Significantly, Congress also sought to modify the 1976 Act's renewal requirement because foreign authors faced an additional problem of being even less familiar than domestic authors with the formality of a renewal requirement because it is unique to U.S. law. In fact, Congress understood that "[t]he domestic laws of most developed countries contain very few formalities conditioning copyright protection" and that compliance with such formalities are "antithetical to the major international treaty on copyright relations, the Berne Convention." S. Rep. No. 102-194, at 6. As noted above, Congress' desire to enact laws consistent with international copyright law generally (and the Berne Convention specifically) is a rational exercise of Congress' Intellectual Property power that promotes the progress of science. *Eldred*, 537 U.S. at 205-06, 123 S. Ct. at 781.

[9] Plaintiffs raise the same policy objections to the 1992 Act's automatic renewal provision as they do with the 1976 Act's elimination of the renewal requirement – namely, that by making renewal voluntary, the 1992 Act "eliminated the mechanism by which unnecessary copyrights" "of no commercial value" would "be dedicated to the public domain." *E.g.* Am.

3. The BCIA promotes the progress of science.

Congress had a rational basis for believing that the BCIA's changes to the notice requirement would promote the progress of science. In 1988, Congress enacted the BCIA to bring the United States in line with the Berne Convention, an international convention aimed at harmonizing copyright law around the world. *Garnier*, 36 F.3d at 1219; H.R. Rep. No. 100-609, at 6-7 (1988) ("The purpose of the legislation is to allow the United States to join the Berne Convention"); S. Rep. No. 100-352, at 1 (1988) (same). Article 5(2) of the Berne Convention states that "the enjoyment and the exercise of [copyright] shall not be subject to any formality." S. Rep. No. 100-352 at 11 (internal quotations omitted). Congress also recognized that "[t]he only real difference . . . that makes the U.S. law incompatible with the Berne Convention consists in the notice and registration requirements." *Id.* Congress further noted that "[t]here is a strong consensus that Berne requires the elimination of mandatory notice of copyright." H.R. Rep. No. 100-609, at 41; S. Rep. No. 100-352, at 13 (same). Thus, to comply with the Berne Convention, Congress enacted the BCIA prescribing, *inter alia*, that the attachment of notice of copyright is no longer required to gain copyright protection for works first published after March 1, 1989. 17 U.S.C. §§ 401, 402.[10]

Compl. ¶¶ 42, 109. Congress considered similar policy arguments when "[o]pponents" of the 1992 Act had argued that mandatory registration renewal should be retained because (1) "the works that would benefit from modifying it . . . are few in number and of little value" and (2) "serves an important public purpose: increasing the volume of works that fall into the public domain, free of copyright protection." S. Rep. No. 102-194, at 6. Congress rejected these arguments as "contrary to the real public purpose for copyright protection: our copyright law grants authors exclusive limited rights to exploit their creations for a sufficient time so they will be encouraged to continue creating works that entertain, educate and fire our imaginations." *Id.* In any event, "courts are not at liberty to second-guess determinations and policy judgments of this order, however, debatable or arguably unwise they may be." *Eldred*, 537 F.2d at 208, 123 S. Ct. at 782-83.

[10] "Congress recognized in 1976 that that the penalties for publishing without notice might be unduly harsh." *John G. Danielson, Inc. v. Winchester-Conant Properties, inc.*, 322 F.3d 26, 35 (1st Cir. 2003) (citing H.R. Rep. No. 94-1476, at 143-44). At the same time, Congress

Congress recognized that enacting the BCIA to implement Article 5(2) of the Berne Convention "will secure the highest available level of multilateral copyright protection for U.S. artists, authors and other creators." S. Rep. No. 100-352, at 2. Given industry losses of $43 to $61 billion through piracy because of "inadequate [foreign] legal protection for United States intellectual property," the Senate noted that implementing the Berne Convention "is a significant opportunity to reduce the impact of copyright piracy on our world trade position." *Id.*; *Luck's Music*, --F. Supp. 2d. --, No. 01-2220 (RMU) slip op. (Ex. 1) at 17 (same).

Courts considering statutes implementing other articles of the Berne Convention have held that such enactments advance the goals of the Intellectual Property Clause when they secure the protection of copyrights of U.S. citizens overseas. For instance, the Supreme Court in *Eldred* recognized that obtaining improved protection for U.S. copyright holders abroad "[c]onsistent with the Berne Convention" justified enacting the CTEA. 537 U.S. at 205-06, 123 S. Ct. at 781 (enacting the CTEA "to ensure that American authors would receive the same copyright protection in Europe as their European counterparts" was a rational exercise of Congressional authority). Similarly, in *Luck's Music Library, Inc. v. Ashcroft*, the court determined that implementing Article 18 of the Berne Convention "to secure the protection of copyrights in foreign countries for United States citizens" justified enacting Section 514 of the URAA because that rationale "bears a rational relationship to the progression of science." --

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also recognized that the placement of copyright notices do serve the purpose of alerting users to the fact that a copyright is claimed in the work in question and may prevent unintentional infringement. S. Rep. No. 100-352, at 43. Thus, the BCIA's amendments to the notice provision encourages the placement of notices through various incentives. *Id.*; 17 U.S.C. §§ 401(d), 402(d). For example, copyright owners using the prescribed notice will defeat a defense in an infringement action based on allegedly innocent infringement in mitigation of actual damages or statutory damages, when offered by a defendant who had access to the noticed copies. 17 U.S.C. §§ 401(d), 402(d); S. Rep. No. 100-352, at 43-44.

F. Supp. 2d --, slip op. (Ex. 1) at 17.[11] Accordingly, because Congress had a rational basis for concluding that the BCIA's changes to the copyright notice provision would advance the goals of the Intellectual Property Clause, the BCIA constitutionally promotes the progress of science.[12]

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[11] Independent of its status as an exercise of Congress' copyright power, the BCIA is also a valid exercise of Congress' constitutional power to implement treaties. The Constitution grants to the President the power, "by and with the Advice and Consent of the Senate to make treaties, provided two thirds of the Senators present concur." U.S. Const. art. II, cl. 2. "If the treaty is valid there can be no dispute about the validity of [an implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." *Missouri v. Holland*, 252 U.S. 416, 432, 40 S. Ct. 382, 383 (1920). Significantly, the treaty power, and Congress' corresponding power to implement treaties through domestic legislation, is not limited by Congress' Article I powers. Thus, powers granted to Congress by Article I cannot provide the outer boundaries for the Article II power to make international agreements. *Id.*, 252 U.S. at 433, 123 S. Ct. at 383 (holding that, even if Congress could not enact the Migratory Bird Treaty using one of the powers enumerated in Article I, the Constitution does not forbid achieving the same result by enacting legislation implementing the treaty). As already noted, the BCIA implements Article 5(2) of the Berne Convention and thereby protects equally U.S. authors and foreign authors from unlawful piracy. Accordingly, Congress had the power to implement the Berne Convention – independent of whether Congress could pass identical language under the Intellectual Property Clause – and, in addition, enacting the BCIA pursuant to its power to implement treaties does not run afoul of any restraint on Congress' power imposed by the Intellectual Property Clause. *Cf. 321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1103-04 (N.D. Cal. 2004) (holding that enacting the Digital Millennium Copyright Act's anti-trafficking provisions pursuant to the Commerce Clause to "[p]rotect[] the exclusive rights granted to copyright owners against unlawful piracy . . . is consistent with the purpose of the Intellectual Property Clause's grant to Congress of the power to 'promote the useful arts and sciences' by granting exclusive rights to authors in their writings . . . and does not run afoul of any restraint on Congress' power imposed by the Intellectual Property Clause") (quoting *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1140-42 (N.D. Cal. 2002)).

[12] It is worth nothing that, as their basis for standing, Plaintiffs allege that four copyright statutes unconstitutionally preclude Plaintiffs from posting on the Internet "works created between 1964 and 1978." Am. Compl. ¶¶ 2, 8, 68 ("It is works first published on or after January 1, 1964 but before January 1, 1978, that are the focus of this action."). At the same time, however, Plaintiffs concede that the 1976 Act's changes to the deposit and renewal requirements only apply to "works created on or *after* January 1, 1978." *Id.* ¶ 47 (emphasis added). Plaintiffs also concede that the BCIA's changes to the notice requirement challenged by Plaintiffs "prospectively eliminated the notice requirement" – *i.e.*, only applying to works first published *after* March 1, 1989. *Id.* ¶ 48. Thus, Plaintiffs have not alleged facts in their Amended Complaint establishing their standing to challenge the 1976 Act and BCIA.

B. The CTEA and the 1992 Act Do Not Violate the "limited Times" Clause

The Supreme Court already considered and upheld the CTEA as a constitutional copyright term extension that does not violate the "limited Times" provision of the Intellectual Property Clause. *Eldred*, 537 U.S. at 204, 123 S. Ct. at 781. Nonetheless, Plaintiffs ask this Court to "reconsider" the *Eldred* decision because they allege that "Congress has no power to extend terms of existing copyrights."[13] Am. Compl. ¶ 117. Yet *Eldred* already addressed the issue of whether "Congress has authority under the Copyright Clause to extend the terms of existing copyrights," and the Supreme Court squarely held that Congress does have such authority. *E.g.*, 537 U.S. at 199, 203-04, 123 S. Ct. at 778, 780 ("Neither is it a sound objection to the validity of a copyright term extension, enacted pursuant to the [Intellectual Property Clause's] grant of authority, that the enlarged term covers existing copyrights."). Accordingly, no further reconsideration of *Eldred* is necessary or appropriate.

Plaintiffs also allege that the CTEA's basic copyright term of the author's life plus 70 years exceeds the "limited Times" allowed by the Intellectual Property Clause because the term is "so long as to be effectively perpetual." Am. Compl. ¶¶ 93-104, 98, 101, 103.

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[13] In their Amended Complaint, Plaintiffs do not explain how the 1992 Act violates the Limited Times provision. Instead, Plaintiffs seek reconsideration of the *Eldred* holding because "[t]he Court in *Eldred* did not consider that every extension before CTEA applied to works whose terms had to be renewed." Am. Compl. ¶ 116. This statement is incorrect; in fact, the Court in *Eldred* understood that the 1976 Act's grant of copyright protection "would run from the work's creation . . . until 50 years after the author's death" thereby "alter[ing] the method for computing federal copyright terms" from its predecessor, the 1909 Act, which had granted protection for "28 years from publication, renewable for an additional 28 years." 537 U.S. at 194-95, 123 S. Ct. at 775. The Court expressly recognized that, while earlier copyright terms that "has been split between an original term and a renewal term," "under the method for measuring copyright terms established by the 1976 Act and retained by the CTEA, the baseline copyright term is measured in part by the life of the author." *Id.*, 537 U.S. at 201

Plaintiffs' challenge is so extreme that even the plaintiffs in *Eldred* (represented by many of the same attorneys who represent Plaintiffs here) did not advance it. 537 U.S. at 193, 123 S. Ct. at 775 ("'Whether 50 years is enough, or 70 years too much,' [Petitioners] acknowledge, 'is not a judgment meet for this Court.'"). Moreover, Plaintiffs advance the very position advocated by Justice Breyer, writing for himself in dissent, which the Court's majority opinion criticized as having "precious little support from precedent." *Id.*, 537 U.S. at 200 n.4, 123 S. Ct. at 778, n.4.

In any event, the term set by the CTEA meets the requirement that the copyright term be limited. The Supreme Court defines the Intellectual Property Clause's term "limited" as "confine[d] within certain bounds, restrain[ed] or circumscribe[d]." *Id.*, 537 U.S. at 199, 123 S. Ct. at 778 (internal quotations omitted). This definition conforms to dictionary definitions from the time of the framing and from contemporary dictionaries. *Id.* By the Court's definition, or any other, the CTEA's term is for a limited period because it ends. *Id.*, 537 U.S. at 210, 123 S. Ct. at 784 (the Supreme Court noted that the copyright extensions enacted in 1831, 1909, and 1976 "did not create perpetual copyrights, and neither does the CTEA"). Thus, Plaintiffs' allegation that the CTEA's term is "effectively perpetual" (Am. Compl. ¶¶ 98, 101, 103) is foreclosed by *Eldred*'s conclusion that "a regime of perpetual copyrights clearly is not the situation before us." 537 U.S. at 209, 123 S. Ct. at 783 (internal quotations omitted); *see also Pennock v. Dialogue*, 27 U.S. 1, 16-17 (1829) (finding that so long as the time period is fixed, the length of such a period shall be subject to the discretion of Congress).[14]

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n.6, 123 S. Ct. at 779 n.6; *id.*, 537 U.S. at 222, 123 S. Ct. at 790 ("The 1976 Act's time extensions . . . set the pattern that the CTEA followed").

[14] Furthermore, the Supreme Court specifically rejected Justice Breyer's argument in his dissent, and advanced by Plaintiffs here (Am. Compl. ¶¶ 99-102), that the CTEA, which

Accordingly, the CTEA's establishment of a copyright term for the life of the author plus 70 years is a term for a limited period that does not violate the "limited Times" provision of the Intellectual Property Clause. *Eldred*, 537 U.S. at 199-200, 123 S. Ct. at 778 (holding that "there is no cause to suspect that a purpose to evade the 'limited Times' prescription prompted Congress to adopt the CTEA").

II. THE CTEA AND THE 1992 ACT DO NOT VIOLATE THE FIRST AMENDMENT

Neither the CTEA nor the 1992 Act violate the First Amendment because they do not alter "the traditional contours of copyright protection" – namely, the "idea/expression dichotomy" and the "fair use" defense – and thus require no further First Amendment scrutiny. The Supreme Court has long recognized that "copyright's limited monopolies are compatible with free speech principles." *Eldred*, 537 U.S. at 219, 123 S. Ct. at 788. For this reason, the *Eldred* Court held that although "[t]he First Amendment securely protects the freedom to make . . . one's own speech[,] it bears less heavily when speakers assert the right to make other people's speeches." *Eldred*, 537 U.S. at 221, 123 S. Ct. at 789. In fact, by offering an economic incentive, "the Framers intended copyright itself to be the engine of free expression." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558, 105 S. Ct. 2218, 2229 (1985); *Eldred*, 537 U.S. at 219, 123 S. Ct. at 788 (holding that "copyright's purpose is to *promote* the creation and publication of free expression") (emphasis in original). For those instances when copyright protections raise First Amendment concerns, the Supreme Court has recognized that copyright law already contains built-in free speech accommodations adequate to address them. *Eldred*, 537 U.S. at 221, 123 S. Ct. at 789.

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allegedly creates a copyright term worth over 99% of the value of a perpetual copyright, makes the term "effectively perpetual." *Eldred*, 537 U.S. at 209 n.16, 123 S. Ct. at 783 n.16 ("It is doubtful that those architects of our Nation, in framing the 'limited Times' prescription, thought in terms of the calculator rather than the calendar.").

Thus, when "Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary." *Eldred*, 537 U.S. at 221, 123 S. Ct. at 790. The Supreme Court has enumerated the two "traditional contours of copyright protection" as (1) the "idea/expression dichotomy" and (2) the "fair use" doctrine. *Eldred*, 537 U.S. at 219-20, 123 S. Ct. at 788-89; *Harper & Row*, 471 U.S. at 539, 556, 560, 123 S. Ct. at 2218, 2228, 2230. "First, copyright law distinguishes between ideas and expression and makes only the latter eligible for copyright protection." *Eldred*, 537 U.S. at 219, 123 S. Ct. at 788-89. This bright-line idea/expression dichotomy strikes "a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting the author's expression." *Id.* (quoting *Harper & Row*, 471 U.S. at 556, 123 S. Ct. at 2228). Due to this "definition," every idea in a copyrighted work becomes instantly available for public exploitation at the moment of publication. *Eldred*, 537 U.S. at 219, 123 S. Ct. at 789. "Second, the 'fair use' defense, [which] allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances." *Eldred*, 537 U.S. at 219, 123 S. Ct. at 789; 17 U.S.C. § 107 (allowing use of copyrighted material for, *inter alia*, "criticism, comment, news reporting, teaching . . . scholarship, or research").

Applying this framework to the CTEA, the *Eldred* Court held that it does not violate the First Amendment because it "has not altered the traditional contours of copyright protection" – thereby squarely rejecting Plaintiffs' claim that the CTEA violates the First Amendment. 537 U.S. at 221, 123 S. Ct. at 790. Indeed, *Eldred* further held that "[t]he CTEA itself supplements these traditional First Amendment safeguards" in at least three ways. 537 U.S. at 220, 123 S. Ct. at 789. *First*, it allows libraries and archives to "reproduce" and "distribute" copies of certain published works "during the last 20 years of any term of copyright . . . for purposes of preservation scholarship, or research" if the work is not already being exploited commercially and further copies are unavailable at a reasonable price. *Id.* (quoting 17 U.S.C. § 108(h)). *Second*, the CTEA exempts small businesses from having to pay performance royalties on music played from licensed radio or television. *Id.* (citing 17 U.S.C. § 110(5)(B)). Thus, *Eldred* concluded that the CTEA does not alter the "traditional contours of copyright protection" because "it protects authors' original expression from unrestricted exploitation." 537 U.S. at 221, 123 S. Ct. at 789.

Like the CTEA, the 1992 Act's automatic renewal provision does not alter the "traditional contours of copyright protection." Plaintiffs claim that the 1992 Act alters the "traditional contours" of copyright protection because the 1992 Act "automatically renewed" the 1976 Act's copyright term and the CTEA "unconditionally extended" that term by 20 years without conditioning such renewals and extensions on formalities such as registration and notice. Am. Compl. ¶¶ 86, 90.[15] Plaintiffs, however, confuse copyright formalities, like renewal registration, with the "traditional contours of copyright protection." Congress does not alter the traditional contours of copyright protection if it does not alter First Amendment accommodations such as the idea/expression dichotomy or the fair-use doctrine. *Luck's Music*, -- F. Supp. 2d --, slip op. (Ex. 1) at 20 (as amended on June 16, 2004) ("Congress has not altered the traditional contours of copyright protection by enacting Section 514. Section 514 does not alter First Amendment accommodations such as the idea/expression dichotomy or the fair-use doctrine.") (internal citations omitted).

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[15] Plaintiffs also allege that the "CTEA was thus the first statute to extend copyright term for works that had not been filtered by a renewal requirement. It is thus the first extension in United States history to so unconditionally and indiscriminately extends the burdens of copyright." Am. Compl. ¶ 63. This allegation is incorrect – the 1831 Act extended the initial term of copyright from 14 to 28 years, without requiring any affirmative act (renewal or

Plaintiffs do not (and cannot) allege, for example, that eliminating renewal registration as a copyright condition redefines or in any way impacts the idea/expression dichotomy. In the same vein, Plaintiffs do not (and cannot) allege that the 1992 Act narrows or changes the scope of the "fair use" doctrine. Hence, the conditional/unconditional line that Plaintiffs draw does not alter or affect in any way the built-in First Amendment accommodations that comprise "the traditional contours of copyright protection;" namely, the "fair use" doctrine and the "idea/expression dichotomy." *Cf. Eldred*, 537 U.S. at 218 n.23, 123 S. Ct. at 788 n.23 (holding that "the petitioners do not explain how their First Amendment argument is moored to the prospective/retrospective line they urge us to draw").

In fact, like the CTEA, the 1992 Act "protects authors' original expression from unrestricted exploitation" by giving all authors – present and future – the same protection from the "harsh consequences" of losing their works "irretrievably into the public domain" for failing to satisfy a renewal registration requirement. S. Rep. No. 102-194, at 7; *accord Eldred*, 537 U.S. at 221, 123 S. Ct. at 789. "Protection of that order does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas." *Eldred*, 537 U.S. at 221, 123 S. Ct. at 789. Accordingly, because the CTEA and the 1992 Act do not encroach on the traditional contours of copyright protections, further First Amendment scrutiny is unnecessary. *Eldred*, 537 U.S. at 221, 123 S. Ct. at 790; *accord Luck's Music*, -- F. Supp. 2d --, slip op. (Ex. 1) at 20 (dismissing First Amendment challenge to Section 514 of the URAA pursuant to Rule 12(b)(6) because "Congress has not altered the traditional contours of copyright protection by enacting Section 514.").

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otherwise) by the author or copyright owner to obtain the extension. Act of Feb. 3, 1831, ch. 16, §§ 1, 16, 4 Stat. 436, 439.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the Amended Complaint should be dismissed pursuant to Rule 12(b)(6).

Dated: June 23, 2004.

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